IN THE

Supreme Court Of The United States

NOVEMBER TERM, 1978

No. 78-861

JOSEPH LAVONNIE GLASSCOCK ..... *Petitioner*

VS.

STATE OF TENNESSEE ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TENNESSEE

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J. B. Cobb, Janet Leach Richards, and James L. Elliott, retained counsel for petitioner, Joseph Lavonnie Glasscock pray that a Writ of Certiorari issue to review the Judgment by the Tennessee Supreme Court entered in the above cause of August 28, 1978.

OPINIONS BELOW

The Court of Criminal Appeals of Tennessee at Jackson, wrote an Opinion in this cause, which was styled Joseph Lavonnie Glasscock v. State of Tennessee, No. 8 and 32 Shelby Criminal, which was filed on March 23, 1978, and it appeared at 570 S.W.2d 354. Petitioner's application for a Writ of Certiorari before the Tennessee Supreme Court was denied on August 28, 1978, and no Opinion was written by the Court, and a copy of the Order evidencing said denial is appended hereto.

JURISDICTION

The Judgment of the Supreme Court of Tennessee was made and entered on August 28, 1978. The Jurisdiction of this Court is envoked under Title 28 U.S.C. §1257(3), providing review by the Supreme Court of the United States of America by Writ of Certiorari where a State Court has decided a Federal question of substance theretofore determined by this Court, or has decided in a way probably not in accord with applicable decisions of this Court; or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution of the United States.

QUESTIONS PRESENTED

1. Does the mandatory life sentence without parole imposed on Petitioner upon conviction of being an habitual criminal violate Petitioner's right not to have cruel and unusual punishment inflicted upon him?

2. Were Petitioner's constitutional rights to due process and/or equal protection under the law, and his right not to be placed twice in jeopardy for the same offense, violated when he was tried twice for being an habitual offender, and where identical evidence was used to enhance at both trials?

3. Were Petitioner's constitutional rights to due process and/or equal protection violated when trial court refused to give requested Jury Instructions which correctly stated the law under a Tennessee State Statute and an Opinion of the Supreme Court of the State of Tennessee?

4. Were Petitioner's constitutional rights to due process and/or equal protection under the law violated when the trial court denies without a hearing Petitioner's Preliminary Motion, which denial amounted to an abuse of the trial court's discretion?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V.

Criminal actions — provisions concerning — due process of law — double jeopardy — and just compensation clauses. — No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or an indictment from a Grand Jury, except in cases arising in the land or naval forces, or in the malitia, where in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VIII.

Criminal actions — cruel and unusual punishment. — That excessive bail ought not to be required, nor excessive fines imposed nor cruel and unusual punishment inflicted.

Amendment XIV.

Section 1. *Citizenship — due process of law — equal protection.* — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abuse the privileges or immunities of citizens of the United States; nor shall any State deprive any person of right, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the law.

STATEMENT OF THE CASE

Joseph Lavonnie Glasscock, Petitioner in this case, seeks review of the Tennessee Supreme Court's affirmation of his conviction for burglary third degree (39 TCA §904) and subsequent six (6) to ten (10) year penitentiary sentence (39 TCA §904). He also seeks review of the Tennessee Supreme Court's affirmation of his conviction for grand larceny (39 TCA §4203) and subsequent six (6) to ten (10) year penitentiary sentence (39 TCA §4204), and also his conviction at this second trial of being an habitual criminal (40 TCA §2801). The grand larceny and habitual criminal convictions occurred in a proceeding subsequent to the one in which he was convicted of burglary third degree, and acquitted of being an habitual criminal. Petitioner was indicted in Shelby County, Tennessee for burglary third degree and habitual criminal. (TR. 1, p. 505). Your Petitioner went to trial on these charges, entered a plea of not guilty by virtue of insanity and was found guilty under the burglary count but not guilty of being an habitual criminal (BE2, p. 276). A motion for new trial was made and denied. (TR. 2, p. 46).

Petitioner was subsequently tried and convicted on a reindictment of the charges contained in two (2) prior indictments, to wit: grand larceny and habitual criminal. (TR. 1, pp. 52-54). The defendant petitioner therein pleaded not guilty by virtue of insanity at the second trial, and the jury returned a verdict of guilty on both counts. (TR. 1, p. 63). Petitioner's motion for a new trial was timely made and overruled. (TR. 1, p. 70). Both of these cases were consolidated on Appeal and were filed with the Court of Criminal Appeals on March 23, 1978, which Opinion can be found at 570 S.W.2d 354.

The Supreme Court of the State of Tennessee denied Certiorari in an unpublished Opinion on August 28, 1978. (See Appendix I).

Prior to the first trial Petitioner filed a Motion to Quash the indictment and to suppress the evidence. This Motion was again renewed prior to the second trial. (TR. 1, p. 36; BE2, p. 256; BE1, pp.1-2). These Motions were denied. In support of the Motion, defendant/petitioner submitted his first set of interrogatories to the HONORABLE HUGH STANTON, Attorney General for Shelby County, Tennessee. (TR. 1, pp. 31-34). (See also Appendix III). In these interrogatories were thirty-two (32) questions, the most important of which were posed in order to determine the manner in which the Attorney General and the Major Violators Unit selected offenders to be tried as habitual criminals.

The Motion and the proof in support of this Motion were denied because not made within twenty (20) days after arraignment. (Rule 9, Rules of Practice and Procedure in the Criminal Courts of Shelby County, Tennessee. See Appendix IV). This Motion was denied even though the defendant/Petitioner's counsel was not employed until almost ninety (90) days after the arraignment. This Motion was again made and denied at the second trial (BE1, p. 2), which denial was assigned as error in Petitioner's Motion for new trial filed at the end of the second trial, upon Petitioner's conviction of being an habitual criminal. (TR. 1, p. 70; See also Appendix V). Counsel for Petitioner in both trials (BE2, p. 257; BE1, p. 2), filed a Pre-Trial Motion which included interrogatories to be submitted to the jurors in the event that they returned a conviction on the habitual criminal count in either trial. (PTM pp. 20-26). The Motion to submit interrogatories to the jurors after they returned

a conviction on the habitual criminal count in the second trial was denied. The interrogatories to be submitted to the jurors reads as follows:

> "Would you sentence the defendant, Joseph Glasscock, to life imprisonment without parole as prescribed under the habitual criminal statute if you were given the opportunity to set the sentence yourself for a term of life or any lessor number of years?"

Petitioner was tried and acquitted of being a habitual criminal in the first trial, and at the second trial was tried and convicted of being an habitual criminal. The former convictions offered as proof in the first trial are the same convictions which were offered as proof in the second trial. (BE2, pp. 265-270). A Mr. Stanley Hathaway testified in both cases as to the prior convictions used to enhance Mr. Glasscock's punishment, and on cross-examination at the second trial testified that he had given the exact same testimony as he gave in the first trial. (BE1, pp. 498-499; See Appendix VI).

At the second trial, Petitioner was convicted of grand larceny, and in the second count of the indictment of being an habitual criminal, and was given six (6) to ten (10) years for the grand larceny conviction and life imprisonment without parole for the habitual criminal conviction.

In Petitioner's appeal to the Court of Criminal Appeals of Tennessee, his assignments of error included the following (edited):

a. It was error for the trial judge to refuse to allow the defendant to show proof as to the Unconstitutionality of the habitual criminal act as applied in Shelby County, Tennessee;

b. It was error for the trial judge to deny the accused the right to voir dire the jury as to the applicability of the habitual criminal act in the incident case;

c. Double jeopardy;

d. It was error for the trial judge to refuse the defendant's request for special jury instructions in both trials;

e. Improper charge to the jury in both trials;

f. It was error for the trial judge not to admonish the prosecutor and caution the jury as to the remarks made by the prosecutor to the jury in the first trial, regarding the instructions, which were highly prejudicial against the defendant.

All of the above mentioned assignments of error were overruled by the Court of Criminal Appeals of Tennessee in an Opinion dated March 23, 1978.

Petitioner assigned as error in his petition to Tennessee Supreme Court for Writ of Certiorari to the Court of Criminal Appeals of Tennessee each of the above assigned errors. Petitioner's request for Writ of Certiorari to the Court of Criminal Appeals of Tennessee was denied, without opinion, by the Supeme Court of Tennessee on August 28, 1978.

REASONS FOR ALLOWANCE OF WRIT

This HONORABLE COURT should review this cause and grant the Petition for Writ of Certiorari to the Supreme Court of Tennessee, because all of the issues raised in the Petition present important constitutional issues decided by the Supreme Court of Tennessee in a way not in accord with applicable decisions of this HONORABLE COURT upholding the constitutional rights of due process of law,

equal protection under the law, and the right not to be placed in jeopardy twice for the same offense, and the right against having cruel and unusual punishment inflicted.

FIRST ISSUE

Does the mandatory life sentence without parole imposed on the Petitioner upon conviction of being an habitual criminal violate Petitioner's right not to have cruel and unusual punishment inflicted upon him?

In *Weems v. United States,* 217 U.S. 349, 30 Supreme Court 544, 54 Lawyer's edition 793 (1909), the Court held that a fifteen (15) year sentence of hard labor in chains for a false entry on an official report violated the Eighth (8th) Amendment. The Court called the sentence "amazing" in light of American Commonwealth "precept of justice that punishment for crimes should be graduated and proportioned to the offense" 217 U.S. at 367.

This proportionality concept has been followed in a number of cases involving capital punishment. *Furmon v. Georgia,* 408 U.S. 238, 92 Supreme Court 2726, 33 Lawyer's Edition 2d 346 (1972); *Gardner v. Florida,* 430 U.S. 349, 51 Lawyer's Edition 2d 393, 97 Supreme Court 1197; *Greg v. Georgia,* 428 U.S. 153, 49 Lawyer's Edition 2d 859, 96 Supreme Court 2909 (1976); *Coker v. Georgia,* 433 U.S. 584, 97 Supreme Court 2861, 53 Lawyer's Edition 2d 982 (1977), the standard of proportionality has also been applied with regard to Habitual Criminal Acts. *Hart v. Coiner,* 483 Fed. 2d 136 (4th Circuit 1973), Cert. denied 415 U.S. 983, 94 Supreme Court 1577, 39 Lawyer's Edition 2d 881 (1974); *Rummel v. Estelle,* 568 Fed. 2d 1193 (1978); *Browning v. Perini,* 518 F. 2d 1288 (6th Circuit 1975), vacated on other grounds, 423 U.S. 993, 96 Supreme Court 419, 46 Lawyer's Edition 2d

367 (1975). In fact, there are some authorities for the proposition that length of the sentence alone can be violative of the Eighth Amendment stand against cruel and unusual punishment. *Hart v. Coiner,* 483 Fed. 2d 136 (4th Circuit 1973); *Carmona v. Ward,* 576 Fed. 2d 405 (1978).

In *Carmona* the Court stated:

> "We accept the proposition that in some extraordinary instances severe sentence imposed for a minor offense could, solely because of its length, be a cruel and unusual punishment. 576 Fed. 2d 409.

In *Coker v. Georgia,* 97 Supreme Court at 2865, the Court stated:

> "Punishment is excessive if it makes no measurable contribution to acceptable goals of punishment and hence is nothing more than a purposeless and needless imposition of pain and suffering."

In order to define what is cruel and unusual, the courts have arrived at numerous objective criterion, such as the nature of the crime, *Rummel* at 1197, comparisons of punishments in same or different jurisdiction, *Coker* at 592-595; *Greg* at 179; *Weems* at 367-377; also *Trop v. Dulles,* 356 U.S. 92, at 182-183, comparing denationalization penalties imposed by other nations; and the legislative purpose and objective, *Hart* at 141; *Greg* at 181-182; *Weems* at 365. Of course, it is necessary that courts avoid substituting their discretion for that of the State Legislature's, but with the sentence such as the Tennessee Statute provides, mandatory life sentence without parole, the law is totally independent of degrees, and on its face appears rather arbitrary. In *Hart,* at 141, the Court stated:

"Could a significantly less severe punishment achieve the purposes of the challenged punishment?"

Tennessee's statutes with regard to habitual criminals do not distinguish between violent and non-violent crimes. (See Appendix VI, 40 TCA 2801, persons defined as habitual criminals). Likewise, in a comparison with other states, even though forty (40) jurisdictions in this country have some version of a long sentence, or even a life sentence for being an habitual criminal, only Tennessee sentences its habitual criminals to a life sentence with no suspension, parole or reduction for good behavior. Code Ala. Tit. 15, §331; Alas. Stat. 4.55.040; Ark. Stat. Ann. 43-2328; Ariz. Rev. Stat. 13-1649; Cal. Pen. Code 644; Col. Rev. Stat. 16-13-101; Conn. Gen. Stat. Ann. 53a-40; Del. Code Ann. Tit. 11, §§4214, 4215; Fla. Stat. Ann. 775.09; Ga. Code Ann. 27-2511; Idaho Code 19-2514; Ind. Code 35-8-8-1; Iowa Code Ann. 747.1; Kan. Stat. Ann. 21-4504; Ky. Rev. Stat. Ann. 532.080; La. Stat. Ann. 15:529.1; Me. Rev. Stat. Ann. Tit. 15, §1742; Mich. Comp. Laws Ann. 769.10; Minn. Stat. Ann. 609.155, 609.16; Vernon's Ann. Mo. Stat. 556.280; Rev. Codes of Montana Ann. 95-1507; Neb. Rev. Stat. 29-221; N.J. Stat. Ann. 2a:85-12, 2a:85-13; New Mexico Stat. Ann. 40a-29-5; McKennies N.Y. Pen. Code Ann. 70.10; Nev. Rev. Stat. 207.010; Gen. Stat. N.C. 14-7.1 — 14-7.6; Okla. Stat. Ann. Chapter 21, §51; Gen. Laws of R.I. 12-19-21; Code Laws S.C. 17-553.1; S.D. Comp. Laws 22-7-1 to 22-7-5; Tenn. Code Ann. 40-2801 FSeq.; Vernon's Texas Pen. Code Ann. 12.42; Vermont Stat. Ann. Tit. 13, §11; Rev. Code of Wa. Ann. 9.-92.090; W.V. Code 61-11-18; Wis. Stat. Ann. 939.62; Wy. Stat. 6-9; 22 DC Code 104, 104a; Laws P.R. Ann. Tit. 33, §131. Only twelve (12) other states provide for required life imprisonment penalties on a founding of habitual criminality. Those are Arkansas, Arizona, Colorado, Delaware, Florida, Indiana, New Mexico, Texas, Washington, and Wyoming. Sleffel, Linda, *The Law and the Dangerous Criminal* (1st edition 1977, pages 4-15).

It is readily apparent that Tennessee Statutes regarding the habitual criminal do not conform to the criterian set forth by this HONORABLE COURT with regard to cruel and unusual punishment. The Eighth Amendment ban against cruel and unusual punishment applies to the States through the Fourteenth Amendment. *Robinson v. California,* 370 U.S. 660 (1962). It is, therefore respectfully submitted that this HONORABLE COURT should grant this Petition for Writ of Certiorari.

SECOND ISSUE

Were Petitioner's Constitutional Right to due process and equal protection under the law, and his right not to be placed twice in jeopardy for the same offense, violated when he was tried twice for being an habitual criminal, and where identical evidence was used to enhance at both trials?

In *People v. Reese,* 258 N.Y. 89, 179 N.E. 305 at 308, Justice Cardozo, when speaking of the New York Habitual Criminal Statute stated:

"Unquestionably this inquiry is a criminal case, and not a civil one, unquestionably it was so conceived by the law makers, for by the terms of the Statute it is made the duty of the District Attorney to file the information accusing the defendant of the previous convictions. This section from beginning to end speaks the language of the Criminal Law. Not only is the proceeding punitive in form, it is punitive also in effect. The answer made to the accusations by the verdict of the jury may mean that the defendant may be a free man

after a brief time of confinement or may mean, on the other hand, that he be a prisoner for life."

The fact that an habitual criminal proceeding is a punitive and criminal proceeding, notwithstanding language to the effect that it is a status, requires the protection of constitutional safeguards. Thus, in an habitual criminal proceeding, the defendant is entitled to counsel, and to the due process requirements of notice and opportunity to be heard. *Chewning v. Cunningham,* 368 U.S. 443 (1961); *Littles v. Cochran,* 365 U.S. 525; *Gideon v. Wainright,* 372 U.S. 335; *Greer v. Beto,* 384 U.S. 269; *Johnson v. State of Kansas,* 284 Fed. 2d 344 (1960). Likewise the defendant in an habitual criminal proceeding is entitled to the protection of the Fifth Amendment right against self incrimination. *Jones v. Boles,* 257 Fed. Supp. 293. The right to a jury trial is also guaranteed in an habitual criminal proceeding. *Chandler v. Fretag,* 348 U.S. 3, 99 Lawyer's Edition 4 (1954).

The Constitutional Fifth Amendment ban against double jeopardy applies to the States through the Fourteenth Amendment. *Benton v. Maryland,* 89 Supreme Court 2056, 395 U.S. 784.

One is placed in double jeopardy when a jury is formed to try the issue upon the indictment. *Green v. State,* 247 S.W. 84, 147 Tenn. 299, 28 ALR 842; *Better v. State,* 205 S.W. 2d 1, 185 Tenn. 218; *Holt v. State,* 24 S.W.2d p. 66, 160 Tenn. 366. One is also placed in double jeopardy when a prior factual determination is relitigated. *State v. Hopson,* 112 Ariz. 497, 543 Pac.2d 1126 (1975). The Fifth Amendment ban against double jeopardy protects against the second prosecution for the same offense after acquittal. *U. S. v. Ball,* 163 U.S. 662; *Green v. U. S.,* 355 U.S. 184, it protects against second prosecution after a conviction. *In re: Nielsen,*

131 U.S. 176, and it protects against multiple punishment for the same offense. *Ex Parte Lange,* 18 Wal. 163; *U.S. v. Berry,* 282 U.S. 304.

It is clear that the same factual determination which resulted in the defendant being acquitted of being an habitual criminal in the first trial was relitigated in the second trial, and upon relitigation the defendant was found guilty of being an habitual criminal. Petitioner would submit to this HONORABLE COURT a line of Texas cases which indicate that where a prior conviction is once used in a trial to enhance upon an habitual criminal charge, it may not be used to enhance punishment in any subsequent habitual criminal charge. *Kenny v. State,* 79 S.W. 570; *Miller v. State,* 140 S.W.2d 859; *Cothren v. State,* 140 S.W.2d 860; *Gooden v. State,* 145 S.W.2d 179; *Carvajal v. State,* 529 S.W.2d 512; *Shaw v. State,* 530 S.W.2d 838; *Ex Parte White,* 538 S.W.2d 417.

In Tennessee, the rule of law is clearly established that double jeopardy attaches when a defendant is convicted or acquitted, and then in a second proceeding for the same offense the prosecution offers the same evidence. This is termed "Same Evidence Rule." *Duchac v. State,* 505 S.W.2d 237 (Tenn. 12/17/73). Thus the State of Tennessee expounds the rule of law requiring protection against double jeopardy where the same evidence is used in two (2) proceedings for the same offense, thereby giving Petitioner the benefit of the law, hence there should be no constitutionally sufficient justification for denying Petitioner such an essential right, because he was tried twice for the same offense using the same evidence. Petitioner was denied equal protection of the law because he was excluded from a class granted protection under a Tennessee Rule of Law,

and instead forced into an arbitrary class and denied equal protection under Tennessee law.

This HONORABLE COURT has defined the equal protection clause of the Constitution to mean that the rights of all persons must rest upon the same rule under similar circumstances. *Louisville Gas and Electric Company v. Coleman,* (1928), 277 U.S. 32, 48 Supreme Court 423; *Frost v. Corporation Commission of State of Oklahoma,* (1929), 278 U.S. 515, 49 Supreme Court 235. The individual States cannot escape their duty to conform their court procedures to this definition and protect all citizens in the enjoyment of the equality of right. *U. S. v. Cruikshank,* (1875), 92 U.S. 542; *Hill v. Texas,* (1942), 316 U.S. 400, 62 Supreme Court 1159. The State of Tennessee cannot shirk its duty to apply its laws equally to all persons within the class designated to be protected by the law. Petitioner contends that he is within the laws protected by Tennessee's Same Evidence Rule.

Petitioner prays that this HONORABLE COURT enforce his right against double jeopardy, under due process of law and equal protection of the law, and not allow him to be arbitrarily separated from a class normally protected under Tennessee law.

THIRD ISSUE

Were Petitioner's rights to due process and/or equal protection violated when trial court refused to give requested jury instructions which correctly stated the law under Tennessee Statute and an Opinion of the Supreme Court of the State of Tennessee?

In both of these trials Petitioner submitted proposed instructions to the jury based upon his plea of not guilty

by virtue of insanity. The portion of the proposed instructions relevant to these trials is as follows:

> "I further charge you that should you find the defendant not guilty by reason of insanity, the law provides that under these circumstances the District Attorney may seek hospitalization of the defendant if he determines hospitalization could be justified."

In neither of the trial court's charges to the jury was this instruction included. Petitioner's proposed instruction was based upon a Tennessee Statute, 33 TCA 709, which states:

> "When a person charged with a criminal offense is acquitted of the charge and a verdict of not guilty by reason of insanity, the District Attorney General may seek hospitalization of the defendant under 33-603 or 33-604 as appropriate, if he determines hospitalization would be justified."

This is a portion of the proposed instruction submitted by the defendant's counsel which the trial judge omitted in each of his charges to the jury. Petitioner submits that this is the portion of the proposed instructions which should be mandatory in any charge to the jury when the defendant is pleading not guilty by virtue of criminal insanity. If not, then any reasonable juror could and would infer that if he acquitted the defendant by virtue of insanity, the defendant would be free to walk the streets. As Justice Henry stated in *Graham v. State of Tennessee,* a decision handed down prior to these trials:

> "We feel that it is appropriate that we call attention to a deficiency in Tennessee law relating to the disposition of a criminal defendant found not guilty by

reason of criminal insanity. 33-709 TCA provides that under these circumstances the District Attorney General *may* seek hospitalization if he determines hospitalization is justified. We do not think that the disposition of such a defendant should be left to the discretion of the District Attorney General."

"The model penal code standards will be applied (1) In all criminal trials or retrials beginning on or after the date of the release of this opinion and; (2) In all cases wherein appropriate special requests were submitted during the trial of the action or the issue otherwise was fairly raised in the trial court and supported by competent and credible testimony, and the conviction has not become final."

Larry Gene Graham v. State of Tennessee, (Supreme Court of Tennessee), 547 S.W.2d 531 (Jan. 1977).

As stated in CJS Criminal Law, 1337, p. 923; where proper request is made for instruction which correctly propounds the law and is warranted by the evidence of pleadings in the case, it is the duty of the court to give it and refusal thereof will constitute error. In further stating the duty of the court as to jury instructions your defendant would offer the language of *Lighter v. State,* 247 S.W. 1065, an Arkansas Supreme Court decision. The Court states as follows:

"While this Court has uniformly held that it is not necessary to repeat instructions where the point involved is already embraced in the instructions given, it is equally settled that it is the duty of the Court to give instructions presenting the defendant's side of the case if there is evidence to support it, and that the defendant request the proper instructions."

Petitioner submits to this HONORABLE COURT the amended Statute 33 TCA 709 which although enacted too late to have any effect upon Mr. Glasscock's appeal, nonetheless is the proper and preferred law, and which itself was enacted largely due to the Supreme Court of Tennessee's decision in *Graham,* which was handed down prior to Mr. Glasscock's trial:

33 TCA 709(e) "The Criminal Court, in a trial before a jury and with the issue of insanity at the time of the committing of the offense is raised, shall instruct the jury before it begins deliberation that a verdict of not guilty by reason of insanity at the time of the commission of the offense shall result in automatic detention of the person so acquitted in a mental hospital or treatment center." TCA 33-709, (as amended) Section e, Acts, 1977, chapter 396, Section 2, May 28, 1977.

In conjunction, a prosecuting attorney in the first trial made a highly improper and prejudicial remark to the jury in his final argument. The exact words of the Attorney General as taken from the transcript of the trial are as follows:

"Mr. Cobb is telling you he doesn't want you to set him free, he wants you to find him not guilty and that's the same thing."

It is submitted by the Petitioner this comment could and probably would create in the mind of the juror and inferrence that the defendant would, if found not guilty on the grounds of insanity, walk the streets a free man. Further, the courts of Tennessee did not find error where the trial judge failed to admonish the Attorney General, caution the jury and strike from the record this highly prejudicial remark.

Improper remarks, calculated to create, arouse, and play on the sympathy, prejudice, or passion of the jury to the detriment of the accused have been condemned by numerous cases. *AZ Din v. United States,* (9th Circuit, 1956), 232 Fed. 2d 283, Cert. denied 77 Supreme Court 39, 352 U.S. 827; *Pietch v. United States,* (10th Circuit, 1940), 110 Fed. 2d 817, Cert. denied 60 Supreme Court 1100, 310 U.S. 648; *Remus v. United States,* (6th Circuit, 1924), 291 Fed. 501, Cert. denied, 44 Supreme Court 180, 263 U.S. 717.

Petitioner submits that as a defendant pleading not guilty by virtue of insanity, he is protected by 33 TCA 709, and by the Rule of Law proposed in *Graham,* and that he belongs to the class which should have been protected by this Statute and this Rule of Law. By not allowing the defendant protection of this Statute and this Rule of Law, the Court has placed the Petitioner in an arbitrary class said not to be within the scope of this Statute and this Rule of Law, thus violating his rights under the equal protection clause of the Fourteenth Amendment.

It is well established in the Federal Court, that a properly requested instruction which is not covered in other instructions should be given, refusal to give the instruction will constitute error. *Coleman v. U. S.*, CCA Texas, 167 Fed. 2d 837; *U. S. v. Frischling,* CCA New Jersey, 160 Fed. 2d 370; *Gold v. U. S.*, CCA New Jersey, 102 Fed. 2d 350; *Hersh v. U. S.*, CCA California, 68 Fed. 2d 799; *Stutz v. U. S.*, CCA Fla., 47 Fed. 2d 1029; *Reger v. U. S.*, CCA Colorado, 37 Fed. 2d 74.

Petitioner prays that this HONORABLE COURT enforce his rights under due process of law and equal protection of the law and not allow him to be arbitrarily

separated from a class normally protected under the laws of Tennessee and the United States.

FOURTH ISSUE

Were Petitioner's constitutional rights to due process and/or equal protection under the law violated when the trial court denied, without a hearing, Petitioner's preliminary Motion, which denial amounted to an abuse of judge's discretion?

Prior to both of these trials, Petitioner filed a Motion to quash the indictment and to suppress the evidence. (See Appendix II). The Motion was denied in each of the trials. In support of the Motion, the defendant submitted his first set of interrogatories to the HONORABLE HUGH STANTON, Attorney General for Shelby County, Tennessee. These interrogatories were thirty-two (32) questions, the most important of which were posed in order to determine the manner in which the Attorney General and Major Violaters Unit selected offenders to be tried as habitual criminals. (See Appendix III).

Likewise, offered by the defendant as proof was Exhibit "A", being the Career Criminal Program Grant Operation, being identified and made part of the record on the first (1st) of August, 1977. This proof is offered in order to show that the manner in which the Attorney General's office, through the Major Violaters Unit, selects offenders to be prosecuted as habitual criminals, does not meet Constitutional Standards. By vesting the ultimate decision to place the defendant in the Career Criminal Program Operation with the director of the Major Violaters Unit, the Attorney General's office is maintaining a practice of prosecuting offenders as habitual criminals, which process of selection

is in violation of due process clause for the Fifth and Fourteenth Amendments of the Constitution of the United States, as well as being in violation of the Eighth Amendment's ban against cruel and unusual punishment.

The proof in support of this Motion and the Motion was denied because it was not timely made within twenty (20) days of the arraignment (Section 9, Rules of Practice and Procedure in the Criminal Courts of Shelby County, Tennessee), even though the defendant's counsel was not employed until ninety (90) days after the arraignment. Section 9 of the Rules of Practice and Procedure in the Criminal Courts of Shelby County, Tennessee, reads as follows:

> "Section 9 — All preliminary motions, pleas, including pleas in abatement, and demurrers other than guilty or not guilty pleas, shall be filed in writing not more than twenty (20) days after the arraignment unless an extension of time be granted by the court for good cause shown. Preliminary Motions, pleas, and demurrers not filed in conformity with this rule shall be summarily dismissed by the court. The attorney filing this motion or plea shall certify in writing that a copy has been forwarded to the adversary counsel and the court. All parties will be notified by the clerk of a hearing date which shall be set by the court as soon as practical."

It is the position of the Petitioner that the Twenty (20) day rule is not mandatory but rather discretionary. In light of this and in light of the fact that the motions and the proof offered in support of the motions address themselves to important Constitutional issues, the defendant would respectfully submit that it is error for the trial judge to refuse to hear proof on the motions. Rule 6 of the Rules of

Practice and Procedure in the Criminal Court of Shelby County, Tennessee, entitled *Waiver of Rules,* reads as follows:

> "Section 1 — Whenever in a particular instance, in the opinion of the trial judge, for good cause shown, and justice requiring, these rules may be waived."

Failure to comply with a local procedural rule which is on its face, reasonable, fair and essential to the orderly process of litigation, may be an adequate ground for a judgment against the defendant. But a failure to comply with local rules does not preclude Supreme Court Review where such rules have denied the litigant a fair opportunity to raise Federal Questions in the State proceedings. *Staub v. City of Baxley,* 355 U.S. 313 (1913); *NAACP v. Alabama,* 357 U.S. 449 (1958).

In light of the importance of the Constitutional Issues at stake, and in light of provisions of the local Rules which enable the trial judge to waive the Rules and/or grant extensions, it is submitted by the Petitioner that denial of his Motion constituted a denial of due process under the Fifth and Fourteenth Amendments of the Constitution of the United States. It is therefore, respectfully submitted that this HONORABLE COURT should grant this Petition for Writ of Certiorari.

CONCLUSION

In deference to justice, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JAMES L. ELLIOTT
Attorney at Law
99 N. Third St.
Memphis, Tennessee 38103
ON BRIEF

J. B. COBB
Attorney at Law
99 N. Third St.
Memphis, Tennessee 38103
(901) 523-0301

JANET LEACH RICHARDS
Attorney at Law
99 N. Third St.
Memphis, Tennessee 38103
(901) 523-0301

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I, James L. Elliott, one of Petitioner's Attorneys, hereby certify that a copy of the foregoing petition for Writ of Certiorari has been served via U. S. Mail, postage pre-paid, on the Attorney General of the State of Tennessee at his office located at 450 James Robertson Parkway, Nashville, Tennessee 37219, on this the 21st day of November, 1978.

/s/ James L. Elliott,
Attorney at Law

Appendix

APPENDIX "I"

COPY OF THE OPINION
IN THE SUPREME COURT OF JACKSON

IN THE SUPREME COURT OF TENNESSEE
AT
JACKSON

JOSEPH LAVONNIE GLASSCOCK ..... *Appellant*

VS.

STATE OF TENNESSEE ..... *Appellee*

COURT OF CRIMINAL APPEALS OF TENNESSEE

MARCH 23, 1978

Certiorari Denied by Supreme Court Aug. 28, 1978.

After two trials before separate juries, the Criminal Court, Shelby County, John P. Colton, Sr., J., convicted defendant of third-degree burglary and grand larceny and, upon a finding by the second jury that defendant was an habitual criminal, his sentence for larceny was enhanced to a life sentence. Defendant appealed from both convictions, and the Court of Criminal Appeals, Daughtrey, J., held that: (1) the trial court did not err in refusing to order the taking of pretrial interrogatories aimed at establishing selective enforcement of the habitual criminal statute; (2) the trial court did not err in refusing to allow voir dire of prospective jurors concerning their predilections toward the imposition of the mandatory life sentence required by the habitual criminal statute; (3) the fact that the first jury found that defendant was not an habitual criminal did not operate to "acquit" defendant of the underlying convictions recited in the habitual criminal charge and, thus, did not

bar the enumeration of the same convictions in a subsequent recidivist count, and (4) the trial court did not err in refusing to charge the jury as to the effect of a finding of not guilty by reason of insanity.

Affirmed.

1. CONSTITUTIONAL LAW *Key* 250.3(1), 270(4)

CRIMINAL LAW *Key* 1201

The habitual criminal statute does not violate the due process or equal protection provisions of the State and Federal Constitutions. T.C.A. §40-2806.

2. CRIMINAL LAW *Key* 627.6(1)

JURY *Key* 131(8)

Trial court did not err in refusing to order the taking of pretrial interrogatories aimed at establishing selective enforcement of the habitual criminal statute; neither did trial court err in refusing to allow voir dire of prospective jurors concerning their predilections toward imposition of the mandatory life sentence required by the habitual criminal statute. T.C.A. §40-2806.

3. CRIMINAL LAW *Key* 186, 1202(5)

Action of jury at first trial on third degree burglary charge in finding that defendant was not an habitual criminal did not operate to "acquit" defendant of the underlying convictions recited and jury's action did not bar State, at a subsequent trial on an unrelated grand larceny charge, from enumerating the same underlying convictions in a new recidivist count. T.C.A. §40-2806.

4. CRIMINAL LAW *Key* 790

Trial court did not err in refusing to charge jury, as

requested by defendant, that when a person charged with a criminal offense is acquitted by a verdict of not guilty by reason of insanity, the district attorney general may seek hospitalization of the defendant if he determines hospitalization to be justified.

5. MENTAL HEALTH *Key* 439

Amendment which requires detention for diagnosis and evaluation of any defendant found not guilty by reason of insanity was not applicable to trials which occurred prior to the effective date of the amendment. T.C.A. §33-709.

J. B. Cobb and Janet L. Richards, Memphis, for appellant.

Brooks McLemore, Jr., Atty. Gen., Robert Grunow, Asst. Atty. Gen., Nashville, Henry P. Williams and Donald D. Strother, Asst. Dist. Attys. Gen., Memphis, for appellee.

OPINION

DAUGHTREY, Judge.

This appeal represents a consolidation of two cases tried before separate juries in the Shelby County Criminal Court. At the first trial the defendant-appellant, Joseph Lavonnie Glasscock, was convicted of third degree burglary and received a sentence of six to ten years. Following a bifurcated hearing, the same jury found the defendant not to be an habitual criminal. At the second trial on an unrelated charge, Glasscock was found guilty of grand larceny. In addition, he was found by the second jury to be an habitual criminal, and his six to ten year sentence for larceny was enhanced to a life sentence under T.C.A. §40-2806.

On appeal from these two convictions, the defendant attacks (1) the constitutionality of the habitual criminal statute, (2) the validity of the imposition of a life sentence for recidivism at the second trial, on the basis of a claimed double jeopardy violation, and (3) the correctness of the trial court's jury instructions. We find no merit to his assignments of error, and, accordingly, we affirm both convictions.

[1, 2] The courts of Tennessee have repeatedly held that the state's habitual criminal statute does not violate the due process or equal protection provisions of the state and federal constitution; nor does its imposition result in cruel and unusual punishment. See, *e.g., State ex rel. Ves v. Bomar,* 213 Tenn. 487, 376 S.W.2d 446 (1964); *Hobby v. State,* 499 S.W.2d 956 (Tenn. Crim. App. 1973). See also *Oyler v. Boles,* 468 U.S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962), holding that selective enforcement of recidivist statutes is not unconstitutional; *cf. Bordenkircher v. Hayes,* 434 U.S. 357, 98 S.Ct. 663, 54 L. Ed. 2d 604 (1978). Since the statute is immune from constitutional attack such as that launched by this defendant, it follows that the trial court committed no error in refusing to order the taking of pretrial interrogatories aimed at establishing selective enforcement of the habitual criminal statute; nor did the trial court err in refusing to allow voir dire of prospective jurors concerning their predilections toward the imposition of the mandatory life sentence required by T.C.A. §40-2806. The related assignments of error are therefore overruled.

[3] The defendant next argues that the judgment of the trial court in the second case finding him to be an habitual criminal and imposing a life sentence constitutes double jeopardy because he had been "acquitted" of being

an habitual criminal at the first trial, under a count which recited the same prior convictions proved at the second trial as the basis for the jury's determination of habitual criminality. We disagree with this analysis. The action of the first jury regarding the recidivist count did not operate to "acquit" the defendant of the underlying convictions recited in that count, and thus it did not bar the enumeration of those convictions in any subsequent recidivist count. *Pearson v. State,* 521 S.W.2d 225 (Tenn. 1975). There was no double jeopardy violation, and the assignment is therefore overruled.

[4] Finally, the defendant complains of the trial court's refusal to charge three special requests related to his insanity defense. Much of the requested material was fully and correctly charged by the trial judge with one exception. The defendant unsuccessfully requested the following jury instruction:

> When a person charged with a criminal offense is acquitted of the charge on a verdict of not guilty by reason of insanity, the district attorney general may seek hospitalization of the defendant under [T.C.A.] §33-603 or §33-604 as appropriate, if he determines hospitalization to be justified.

The defendant insists that this instruction is mandatory as the result of the Tennessee Supreme Court's opinion in *Graham v. State,* 547 S.W.2d 531 (Tenn. 1977), in which the court adopted the Model Penal Code's standard for the determination of insanity, making it applicable to all trials or re-trials beginning on or after the release of the *Graham* decision. It is true that in the course of its opinion, the *Graham* court did bemoan "a deficiency in Tennessee law relating to the disposition of a criminal defendant found not

guilty by reason of insanity," pointing out that " 'the district attorney-general *may* seek hospitalization' " of the defendant. 547 S.W.2d at 544. However, this language was clearly dicta and must be understood for what it was: a plea to the legislature to cure the deficiency identified in the opinion, *i.e.* the fact that the procedure in question is purely discretionary with the district attorney. Thus, nothing in the *Graham* opinion changes the court's previous holding in *Edwards v. State,* 540 S.W.2d 641, 648-9 (Tenn. 1976), to the effect that it is not error to refuse to charge a jury as to what the effect of a finding of not guilty by reason of insanity would be, because such a charge "is not relevant to the issue of . . . guilt or innocence," and there are "so many options and alternatives available, depending upon the mental condition of the accused, it would be highly conjectural and would involve the jury in speculation as to what might happen to the accused." We conclude that *Edwards* is controlling on the case before us, and we therefore overrule the defendant's remaining assignments of error.

[5] Finally, we note that in response to the Supreme Court's plea in *Graham v. State, supra,* the legislature in 1977 amended the provisions of T.C.A. §33-709 to require detention for diagnosis and evaluation of any defendant found not guilty by reason of insanity under T.C.A. §40-2530. Under Subsection (e) of §33-709, as amended, the jury must now be instructed in each case "in which the issue of insanity at the time of the commission of the offense is raised . . . that a verdict of not guilty by reason of insanity . . . shall result in automatic detention of the person so acquitted in a mental hospital or treatment center," as provided by §33-709(a). These amendments were not effective until May 28, 1977, however, and thus are not

applicable to the trials in the defendant's two cases, which occurred on March 3 and March 30, 1977.

The judgment of the trial court is affirmed.

WALKER, J., and ARTHUR C. FAQUIN, Jr., Special Judge, concur.

IN THE SUPREME COURT OF TENNESSEE
AT
JACKSON

JOSEPH LAVONNIE GLASSCOCK ..... *Petitioner*

VS.

STATE OF TENNESSEE ..... *Respondent*

SHELBY CRIMINAL

MEMORANDUM ON PETITION FOR WRIT OF CERTIORARI

Upon consideration of the petition for the writ of certiorari, the briefs of counsel and the entire record, we are of the opinion that the Court of Criminal Appeals reached the correct conclusion.

The writ is respectfully denied.

PER CURIAM

APPENDIX "II"

MOTION TO QUASH INDICTMENT AND TO SUPPRESS EVIDENCE

IN THE CRIMINAL COURT OF
SHELBY COUNTY, TENNESSEE

STATE OF TENNESSEE, VS. JOSEPH GLASSCOCK, *Defendant*	No. 54455 Division V Set: 1/10/77

MOTION TO QUASH INDICTMENT AND TO SUPPRESS EVIDENCE

TO THE HONORABLE JOHN COLTON, JUDGE OF DIVISION V OF THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE:

Comes now your defendant, Joseph Glasscock, by and through his attorney and would respectfully state and show unto this Honorable Court as follows:

I.

That the Indictment No. 54455 charging your defendant, Joseph Glasscock, with Grand Larceny and Habitual Criminal was obtained by improper procedure based upon a statute that your defendant charges is unconstitutional under the 5th, 8th, and 14th Amendments of the Constitution of the United States and under Article 1, §6 of the Constitution of the State of Tennessee. In support of this contention, your defendant would show:

a) That your defendant was originally apprehended on September 16, 1975 in the parking lot near Sears and Roebuck Company and told by the officers then present

that he was being charged with shoplifting and that if he could produce identification the officers would write him a summons and release him at that time.

b) Your defendant had no identification on him at the time and therefore, the officers would not write him a summons and release him, even though one of the officers stated to your defendant that he did recognize him and knew who your defendant was.

c) Your defendant was later transported to the City Jail and detained in general investigation. He was later told that he was charged with shoplifting and that he had a $250.00 bond.

d) Before your defendant could make bond, he was bound over on the 17th day of September, 1975 to the Shelby County Jail and advised that he was being charged with Grand Larceny and Habitual Criminal. He was never presented before a committing magistrate in the City Court system prior to being bound over.

e) Your defendant's bond was set at $5,000.00 when he was originally bound over to the Criminal Court. However, when his public defender requested that your defendant receive a psychological evaluation prior to standing trial, this Honorable Court arbitrarily and with no apparent justification, doubled his bond to $10,000.00.

f) Your defendant further contends that his presentment to the Grand Jury on the charge of Habitual Criminal was an arbitrary decision made by the Attorney General's Office through its agent, the Major Violator's Unit, without regard to your defendant's

past history and the purposes of the Habitual Criminal Statute. Your defendant contends further that the purpose of the Habitual Criminal Statute is to remove from society those persons that have demonstrated to the Court on repeated occasions that they are incapable of rehabilitation and that they are menaces to society. Your defendant is not a menace to society, is not a violent criminal, and is capable of rehabilitation, given proper psychiatric care. Your defendant is not a habitual criminal, but rather suffers from a drug abuse problem and needs psychiatric care, not incarcerated for life.

g) Tennessee Code Annotated, §40-2801 et seq. removes from the province of the judge and jury the discretion whether or not the defendant should automatically serve a life sentence if indeed he is found to have been convicted of four (4) previous felonies. Your defendant contends that no jury would sentence him to life based on the circumstances of this case and his past record if they were given the opportunity to decide between life and a lesser sentence. However, under the wording of the Habitual Criminal Statute, the jury has no such discretion and therefore, the statute constitutes cruel and unusual punishment and is unconstitutional.

h) Your defendant further alleges that he is denied a fair and impartial trial by being designated as a "habitual criminal" under the Career Criminal Program as instituted in Shelby County. Under this program the judges of the Shelby County Criminal Court System have previously agreed that they will set high bonds for persons charged under the Habitual Criminal Statute and that they will expedite the cases

of defendants charged as habitual criminals. The probable effect of this is that the judges are already prejudiced against anyone charged as a habitual criminal from the time that the indictment is returned. The probable effect of expediting cases is that a high percentage of the cases will be transferred to the overflow judge in Division VIII which will in effect create a "Career Criminal Judge" who will try a large portion of the Career Criminal cases and thus, even jurors will come to expect that anyone tried in Division VIII is being tried under the Habitual Criminal Statute.

i) Finally the Habitual Criminal Statute as worded, allowing the jury no discretion in imposing sentence, gives the prosecution unfair advantage in plea bargaining with anyone who has committed a fourth offense without regard to severity of the crime, in that any offer must be weighed against the alternative of an automatic life sentence without parole, should the fourth offense be upheld in Court.

II.

All photographs taken by the prosecution are not properly admissible in the trial of this cause and therefore should be suppressed for the following reasons:

a) These photographs are posed;

b) These photographs do not accurately depict the physical surroundings at the time and place of the alleged crime;

c) These photographs are not the best evidence and should be excluded under the Best Evidence Rule;

d) These photographs are irrelevant and immaterial to the issues in this lawsuit.

WHEREFORE, PREMISES CONSIDERED, your defendant, Joseph Glasscock, moves this Honorable Court to quash the indictment, No. 54455 of Grand Larceny and Habitual Criminal against him and to suppress and exclude from evidence all photographs taken by the prosecution.

Respectfully submitted,

/s/ J. B. Cobb, Attorney for Defendant
99 North Third St.
Memphis, TN 38103
Phone No. 523-0301

FILED 12-30-76
J. A. Blackwell, Clerk
/s/ By: J. C. Beasley, D.C.

CERTIFICATE

I, J. B. Cobb, attorney for defendant certify that a copy of the foregoing has been mailed this, the 30th day of December, 1976 to adversary counsel at their usual business addresses.

/s/ J. B. Cobb

APPENDIX "III"

INTERROGATORIES TO HUGH STANTON
(Defendant's first set of interrogatories)

IN THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE

STATE OF TENNESSEE, vs. JOSEPH GLASSCOCK, *Defendant*	No. 54455 Division V Set: 11/29/76

DEFENDANT'S FIRST SET OF INTERROGATORIES

Comes now your defendant, Joseph Glasscock, and in an attempt to contest the validity of the habitual criminal statute under which he is presently charged, would propound the following interrogatories to the Honorable Hugh Stanton, Attorney General for the Criminal Court of Shelby County, Tennessee:

1. When was it first decided that your defendant, Joseph Glasscock, would be charged as a habitual criminal under TCA Section 40-2801 et seq.?

2. Was this determination made by one person or by more than one person?

3. Name the people present when the determination was made to present the charge of habitual criminal to the Grand Jury.

4. If more than one person was present when the determination was made to charge the defendant with the habitual criminal statute, was the decision unanimous?

5. If the decision in the preceding interrogatory was not unanimous, how many dissenting votes were cast and who cast the dissenting votes?

6. Were any minutes kept of the meeting if any, in which determination was made to charge your defendant, Joseph Glasscock with violation of the habitual criminal statute?

7. If the answer to the above interrogatory is in the affirmative, please attach a copy of such minutes, if you will, without a Motion to Produce.

8. Was any memoranda made in reference to the determination to charge the defendant, Joseph Glasscock, with violation of the habitual criminal statute?

9. If the answer to the above interrogatory is in the affirmative, please attach a copy of such memoranda, if you will, without a Motion to Produce.

10. Was your defendant Joseph Glasscock, originally charged with shoplifting in connection with the September 16, 1976 incident at Sears & Roebuck Company, which is the subject of this suit?

11. If the answer to the preceding interrogatory is in the affirmative, when was the charge changed from shoplifting to grand larceny?

12. If the answer to interrogatory No. 10 is in the affirmative, how was the charge changed from shoplifting to grand larceny?

13. If the answer to interrogatory No. 10 is in the affirmative, why was the charge changed from shoplifting to grand larceny?

14. If the answer to interrogatory No. 10 is in the affirmative, by whom was the charge changed from shoplifting to grand larceny?

15. Are there any reports, memoranda or interoffice memos concerning the format to be used in determining when a defendant will be charged under the habitual criminal statute?

16. If the answer to the above interrogatory is in the affirmative, please attach a copy of such writings, if you will, without a Motion to Produce.

17. Has there been any discussion in your staff as to the distinction between repeater criminals whose crimes are drug-related or brought about by dependency on drugs as opposed to repeater criminals who attempt to gain money or property by using violence or force?

18. If the answer to the above interrogatory is in the affirmative, please summarize said discussions.

19. If the answer to interrogatory No. 17 was in the affirmative, please attach all reports, minutes, memoranda, or other writings concerning such discussions, if you will, without a Motion to Produce.

20. In determining which defendant will be charged with the habitual criminal act, does the Attorney General's office make any distinction between criminals who commit violent acts as opposed to criminals whose acts are non-violent?

21. If the answer to the above interrogatory is in the affirmative, please specify what distinction is made.

22. Was the Attorney General's Office contacted

through its Assistant Attorney General, Hank Williams, by the defendant's father, Reverend Glasscock, on or about June 20, 1976, in an attempt to have the grand larceny charge against the defendant dropped in order that the defendant might be involuntarily committed to Tennessee Psychiatric Hospital?

23. Was the Attorney General's Office made aware through its Assistant Attorney General, Hank Williams, that involuntary hospitalization was indicated and recommended by the Northeast Community Mental Health Center who had been treating the defendant, and that said involuntary hospitalization was impossible so long as criminal charges were pending?

24 Did the Attorney General's Office review the defendant's file at this time to determine whether it would be in the community's best interest to drop the grand larceny charge arising out of an April 3rd incident which was drug-related in order that the defendant might be involuntarily hospitalized and treated for his drug abuse problem?

25. If the answer to the above interrogatory is in the affirmative, please attach any memoranda or other writings concerning this matter, if you will, without a Motion to Produce.

26. Who presented the defendant's case to the Grand Jury?

27. Was the defendant's case presented as one of shoplifting or of grand larceny?

28. Was the Grand Jury made aware of the fact that there was a charge under the habitual criminal statute in addition to the grand larceny charge before the true bill was returned on the charge of grand larceny?

29. Were the dates, charges, and circumstances surrounding each conviction made known to the Grand Jury before it returned a true bill on the habitual criminal statute?

30. Was the Grand Jury advised of the defendant's drug abuse problem?

31. Was the Grand Jury advised of the relationship between the defendant's drug abuse problem and his prior convictions?

32. Was the Grand Jury advised of the relationship between the defendant's drug abuse and the charge of grand larceny presented to the Grand Jury?

Respectfully submitted,

/s/ J. B. Cobb, Attorney for Defendant

CERTIFICATE

I, J. B. Cobb, attorney for the defendant, certify that a copy of the foregoing has been mailed on this, the —— day of ————————, 1976 to the Attorney General's business address.

/s/ J. B. Cobb

APPENDIX "IV"

RULES OF PRACTICE AND PROCEDURE IN THE CRIMINAL COURTS OF SHELBY COUNTY, TENNESSEE

RULES OF PRACTICE AND PROCEDURE IN THE CRIMINAL COURTS OF THE FIFTEENTH JUDICIAL CIRCUIT OF TENNESSEE (SHELBY COUNTY)

RULE I

CANONS OF ETHICS

SECTION 1. The Cannons of Professional Ethics promulgated by the Supreme Court of Tennessee and the Tennessee Bar Association are adopted as the rules of the professional conduct, so far as they relate to the matters within the jurisdiction and cognizance of this Court.

RULE II

FORMER RULES ABROGATED

All former rules of local practice are abrogated.

RULE III

PRACTICE AND PROCEDURE

SECTION 1. All pleadings including written motions, orders, and decrees shall be typewritten, double-spaced, upon law paper, having a blank margin on the left of every page, and shall be captioned on the front page showing the number of the case, the name of the Court, the style of the case, the crime charged and the general nature of the paper filed.

SECTION 2. All cases shall be set for trial chronologically as indicated, unless otherwise ordered by the Court,

with cases involving an incarcerated defendant having precedence. To advance a case on the calendar a petition setting forth the reasons for such advance shall be filed with the Clerk of the Court, addressed to all the Criminal Court Judges. Said Judges shall appoint one of their number to hear said petition and thereafter shall all jointly determine whether such advance shall be granted, and if so, when and in which division of the Court the case should be set.

SECTION 3. All Petitions for probation of sentence shall be filed together with affidavits, if any, in the Division of Court in which the case is set with the Clerk of the Court at least twenty (20) days prior to the hearing by the Court.

SECTION 4. Attorneys for the defense shall write their names on the jacket containing the Court papers in the case immediately upon their employment as counsel. The Clerk is directed to enter the name of such attorney upon the minutes of the Court. In all cases wherein an attorney appears in open Court representing a defendant upon a criminal charge and his name is entered and plea made, he shall remain the attorney of record until disposition of the case, unless otherwise excused by the Court for good cause shown.

SECTION 5. The Clerk of the Court shall prepare a calendar of cases three (3) weeks in advance which shall be published. All attorneys of record at the time the calendar is prepared will be notified by mail by the Clerk of the setting of their cases.

SECTION 6. In all cases where demand is made for the Jury to pass on all the punishment, such demand shall be made before the voir dire of the Jury is commenced.

SECTION 7. Motions for New Trial shall be in writing stating the grounds therefor, and filed with the Clerk of the Court, not later than thirty (30) days after the entry of the judgment upon the verdict of the Jury, and five (5) days before the hearing by the Court.

SECTION 8. All transcripts, records, narratives, or other written instruments intended for Bills of Exceptions shall be delivered to adversary counsel on the sixth (6th) day prior to the last day allowed for filing in all cases. Where last day for delivering said transcripts or narratives to adversary counsel under this rule falls on a Saturday, Sunday or Holiday, same must be delivered on last day next preceding such Saturday, Sunday, or Holiday. In all cases where agreement as to the contents of the Bill of Exception cannot be reached between counsel, same must be submitted to the Court for settlement forty-eight (48) hours before the last day for filing same.

SECTION 9. All preliminary motions, pleas, including pleas in abatement, and demurrers other than guilty or not guilty pleas, shall be filed in writing not more than twenty (20) days after arraignment unless an extention of time be granted by the Court for good cause shown. Preliminary motions, pleas, and demurrers not filed in conformity with this rule shall be summarily dismissed by the Court. The attorney filing the motion or plea shall certify in writing that a copy has been forwarded to the adversary counsel and the Court. All partes will be notified by the Clerk of the hearing date which shall be set by the Court as soon as practical.

SECTION 10. Where there is more than one defendant in a case, defense counsel may agree on the order they shall follow. Where they are unable to agree, the order in

which the defendants are named in the indictment shall be followed. Such order shall be followed in the voir dire, pleas, cross-examination, testimony of defendants, and arguments of counsel.

SECTION 11. The Courts will convene at 9:30 A.M.

SECTION 12. Conferences — Witnesses will be subpoenaed to attend at the hour of 9:00 A.M. on the day set for trial in each case and together with the attorneys will be present at said hour for conference with the attorney general or his assistant until the opening of court at 9:30 A.M. Thereafter no time will be granted for negotiations. It is the positive duty of the District Attorney, his assistants, and defense attorneys to be ready to dispose of their cases on the date set.

SECTION 13. All divisions of Criminal Court will accept transfer of cases that are ready for immediate commencement of trial.

SECTION 14. Witnesses — Subpoenas for witnesses, both for the state and defendant, shall be issued seven (7) days prior to the date of trial. No continuance shall be granted based upon an absent witness unless witness was subpoenaed in conformity with this section.

SECTION 15. Court files — All papers and records of the Court shall at all times be under the custody and control of the Clerk. No person except the Clerk and his deputies shall be allowed access to the Court files. No files shall be withdrawn from the office except by the Judges of the Court, or when they are taken to the Courtroom by the Clerk and by attorneys upon permission of the Clerk.

No files shall be withdrawn from the Clerk's custody

by attorneys without the Clerk first obtaining a recepit therefor.

RULE IV

COURTROOM DECORUM

SECTION 1. The space within the rail of the Courtroom is reserved for litigants actually engaged in trial and for attorneys of the local Bar.

SECTION 2. At the opening of each session of Court, all persons in the Courtroom will rise and with the Judge, remain standing until Court is formally opened.

SECTION 3. Counsel will stand when examining or cross-examining witnesses, or when addressing the Court or the Jury unless excused by the Court.

SECTION 4. Counsel shall not place or leave upon the tables of the Courtroom any hats, garments, newspapers, magazines, etc.; nor shall they engage in any conversation, consultation, or other activity that may be calculated to disturb the orderly procedure during the proceeding before the Court.

SECTION 5. Counsel shall be properly attired including wearing coat and tie in the Courtroom.

SECTION 6. Counsel shall not engage in repartee or colloquy and shall address their remarks to the Court instead of each other.

SECTION 7. In making an objection to the testimony, counsel shall state only the legal grounds therefor, and shall not attempt to argue said objections in the presence of the Jury except with leave of Court.

SECTION 8. The argument of counsel to the jury shall be confined to the issues in the case and supported by the proof. Counsel may suggest such facts and circumstances as have been etablished by evidence or by knowledge, and the reasonable inferences to be drawn therefrom. Argument must be addressed to the entire Jury, instead of to one or more individual jurors, as contemplated by the cannon of professional ethics that forbids counsel to curry favor with jurors.

RULE V

ENTRY RULES AND AMENDMENTS OF MINUTES

SECTION 1. These rules of Court and all amendments thereto, shall be entered on the minutes of all six divisions of Criminal Court as promptly as practicable after adoption. Reference to said rules by minute entries shall be deemed sufficient identification thereof.

RULE VI

WAIVER OF RULES

SECTION 1. Whenever in a particular instance, in the opinion of the trial Judge, for good cause shown, and justice requiring, these rules may be waived.

Bernie Weinman
Judge, Division 1
Arthur C. Faquin, Jr.
Judge, Division 2
William H. Williams
Judge, Division 3
H. T. Lockard
Judge, Division 4
John P. Colton, Sr.
Judge, Division 5
James C. Beasley
Judge, Division 6

APPENDIX "V"

PETITIONER'S MOTIONS FOR NEW TRIAL IN 56059 and 56058

IN THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE

STATE OF TENNESSEE, *Plaintiff*	No. 56068
VS.	Third Degree Burglary
JOSEPH GLASSCOCK, *Defendant*	Larceny and Habitual Criminal

DEFENDANT'S MOTION FOR A NEW TRIAL

TO THE HONORABLE JOHN COLTON, JUDGE OF DIVISION V OF THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE:

Comes now your defendant, Joseph Glasscock, by and through his attorney, J. B. Cobb, and moves this Honorable Court for a New Trial. In support of this Motion your defendant would state and show unto this Honorable Court as follows:

That the defense offered by your defendant in this cause was "not guilty by reason of criminal insanity."

That prior to closing arguments, counsel for your defendant submitted to the Court a jury instruction based on T.C.A. 33-709 which was outlined and discussed in *Graham v. State*, Supreme Court of Tennessee, January 31, 1977. The Court was advised of the authority for the proposed instruction even though said authority was not noted on the instruction. This proposed instruction, advising the

jury that the District Attorney General could seek hospitalization of the defendant if he were found to be criminally insane, was denied by the Court.

That the District Attorney General, in his closing argument stated that if the jury found the defendant not guilty by reason of criminal insanity, it would be the same as "setting him free."

That following closing argument but prior to charging the jury, counsel for the defendant again requested that the Court give Defendant's proposed jury instruction pertaining to discretionary hospitalization of the Defendant. Said proposed jury instruction was designated Number Three and is attached to this Motion as Exhibit "A". The requested instruction is bracketed.

That counsel for the Defendant argued at that time, that in light of the District Attorney General's statements in closing argument, it would be prejudicial to your Defendant for the jury to be misled in this manner. Without the benefit of this requested charge, the jury would believe, erroneously, that if they found the Defendant not guilty by reason of criminal insanity he would be set free.

Your Defendant contends that the failure to give Defendant's Proposed Jury Instruction Number Three resulted in the Jury's being misled as to the consequence of a finding of "not guilty by reason of criminal insanity" and that such refusal was error which prejudiced your Defendant.

Your Defendant further contends that the prosecutor's argument to the jury was improper tending to mislead the jury as to the consequences of a finding of "not guilty by

reason of criminal insanity" and that such argument resulted in prejudicial error as to your Defendant.

WHEREFORE, your Defendant moves this Honorable Court for a new trial on the charges of Third Degree Burglary and Larceny.

Respectfully submitted,

/s/ J. B. Cobb, Attorney for Defendant

CERTIFICATE

I, J. B. Cobb, certify that I have mailed a copy of the foregoing to opposing counsel this 23rd day of March, 1977.

/s/ J. B. Cobb

FILED 3-24-77

IN THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE

STATE OF TENNESSEE, VS. JOSEPH GLASSCOCK, *Defendant*	No. 56059 Grand Larceny and Habitual Criminal

DEFENDANT'S MOTION FOR A NEW TRIAL

TO THE HONORABLE JOHN COLTON, JUDGE OF DIVISION V OF THE CRIMINAL COURT OF SHELBY COUNTY, TENNESSEE:

Comes now your defendant, Joseph Glasscock, by and through his attorney of record, J. B. Cobb, and moves this Honorable Court for a New Trial and in support of this

Motion your defendant would state and show unto this Honorable Court as follows:

I.

That the defense offered by your defendant in this cause was "not guilty by reason of criminal insanity."

That prior to closing argument, counselor for your defendant submitted to the Court a jury instruction based on TCA §33-709, which was outlined and discussed in *Graham v. State*, Sup. Ct. of Tennessee, Jan. 31, 1977. The Court was advised of the authority for the proposed instruction even though said authority was not noted on the instruction. This proposed instruction advised the jury that the District Attorney General could seek hospitalization of the defendant, if he were found to be criminally insane. Said jury instruction was denied.

Said proposed jury instruction is attached to this Motion as Exhibit "A". The requested instruction is bracketed.

Your defendant contends that without the benefit of this requested charge, the jury would believe, erroneously, that if they found the defendant not guilty by reason of criminal insanity, he would be set free. Your defendant contends that the failure to give defendant's proposed jury instruction resulted in the jury's being misled as to the consequence of a finding of "not guilty by reason of criminal insanity" and that such refusal was an error which prejudiced your defendant.

II.

That the Court erred in refusing to allow a hearing on the merits of a preliminary motion attacking the constitutionality of the habitual criminal statute as applied in

Shelby County. The Court based its ruling on the fact that the written motion was filed more than twenty (20) days after the date of your defendant's indictment, and that pursuant to local rules, said Motion was required to be filed within that twenty day period. This ruling was made in spite of the fact that your defendant did not employ J. B. Cobb as his counsel until some ninety (90) days after the date of indictment and that he was previously represented by the Public Defender. The Court also made this ruling in spite of the fact that your defendant was reindicted on this same charge following a mistrial under the original indictment No. 55780, all of which your defendant claims resulted in his being denied a fair and impartial trial. Your defendant claims that this constituted a reversible error.

III.

Your defendant further contends that he was exposed to "double jeopardy" in this cause in that following the mistrial under indictment No. 55780 in which your defendant was charged with Grand Larceny of a tape player and Habitual Criminal, he was reindicted on this same count and also reindicted on the charge of Burglary Third Degree of two (2) bicycles from Goodyear Service Store. The original indictment concerning the bicycles at Goodyear was indictment No. 52801 which indictment was for the charge of Burglary Third Degree only. Under the reindictment No. 56068, your defendant was charged not only with Burglary Third Degree but also Habitual Criminal. At the trial of indictment No. 56068, your defendant was found guilty of Burglary Third Degree but was found not guilty of the charge of being a Habitual Criminal.

Your defendant would show that the same previous felony convictions which formed the basis of the charge of

Habitual Criminal under indictment No. 56068 were the same felony charges which formed the basis of the charge of Habitual Criminal under this same indictment No. 56059 and that your defendant had already been found not guilty as a Habitual Criminal for the previous felony convictions.

Your defendant contends that to allow a jury to reconsider the question of whether he was a Habitual Criminal based on the previous felony convictions exposed him to "double jeopardy" and was reversible error.

IV.

Your defendant further contends that reversible error was committed in denying your defendant's interrogatories to the jury. Your defendant's counsel prepared several interrogatories which were presented to this Court while the jury was deliberating on the charge of Habitual Criminal. Your defendant's counsel requested that these charges be submitted to the jury if and when they returned a verdict of "guilty" as a Habitual Criminal. The purpose of these interrogatories was to establish your defendant's contention that the Habitual Criminal Statute constitutes a cruel and unusual punishment and is therefore unconstitutional.

This Court refused to allow your defendant's counsel to propound these interrogatories to the jury, and therefore, your defendant contends that this resulted in reversible error.

V.

Your defendant further contends that this Court's refusal to allow your defendant's counsel to examine the Attorney General also resulted in reversible error. Your defendant's counsel requested an examination of the Attor-

ney General under oath in order to prove the unconstitutionality of the Habitual Criminal Act as it is applied in Shelby County. The refusal of the Court to allow the examination of the Attorney General prevented your defendant from obtaining the information necessary to pursue his attack on the constitutionality of the Habitual Criminal Statute as applied in Shelby County, and therefore denied him the right to a fair trial, and resulted in reversible error.

WHEREFORE, PREMISES CONSIDERED, your defendant moves this Honorable Court for a new trial on the charges of Grand Larceny and Habitual Criminal.

Respectfully submitted,

/s/ J. B. Cobb, Attorney for Defendant
99 North Third St.
Memphis, TN 38103
Phone 523-0301

CERTIFICATE

I, J. B. Cobb, attorney for defendant, certify that a copy of the foregoing has been hand delivered this, the 20th day of April, 1977 to the Attorney General, 157 Poplar Avenue, Memphis, Tennessee.

/s/ J. B. Cobb

FILED 4-20-77
J. A. Blackwell, Clerk
/s/ By: G. C. Moore, D.C.

APPENDIX "VI"

T.C.A. 40-2801, 2804, 2805, and 2806

CHAPTER 28

HABITUAL CRIMINALS

40-2801. *Persons defined as habitual criminals.* — Any person who has either been three (3) times convicted within this state of felonies, not less than two (2) of which are among those specified in §§39-604, 39-605, 39-609, 39-610, 39-3708, 40-2712, 52-1432(a)(1)(A) or were for a crime punishable by death under existing law, but for which the death penalty was not inflicted, or who has been three (3) times convicted under the laws of any other state, government or country of crimes, not less than two (2) of which, if they had been committed in this state, would have been among those specified in said §§39-604, 39-605, 39-609, 39-610, 39-3708, 40-2712, 52-1432(a)(1)(A) or would have been punishable by death under existing laws, but for which the death penalty was not inflicted, shall be considered, for the purposes of this chapter, and is declared to be an habitual criminal, provided that petit larceny shall not be counted as one of such three (3) convictions, but is expressly excluded; and provided, further, that each of such three (3) convictions shall be for separate offenses, committed at different times, and on separate occasions. [Acts 1939, ch. 22, § 1; mod. C. Supp. 1950, § 11863.1; Acts 1973, ch. 212, § 1.]

40-2804. *Evidence of prior convictions.* — In all cases where a person is charged under the provisions of this chapter with being an habitual criminal, the record, or records, of prior convictions of such person upon charges constituting felonies, shall be admissible in evidence, but

only as proof that such person is, in fact, an habitual criminal, as difined in §40-2801, and a judgment of conviction of any person in this state, or any other state, country, or territory, under the same name as that by which such person is charged with the commission, or attempt at commission, of a felony under the terms of this chapter, shall be prima facie evidence that the identity of such person is the same. [Acts 1939, ch. 22, § 7; C. Supp. 1950, § 11863.7.]

40-2805. *Verdict and judgment.* — When an indictment or presentment charges an habitual criminal with a felony, as above provided, and also charges that he is an habitual criminal, as provided herein, upon conviction it shall be the duty of the trial judge to specifically inquire of the jury as to whether they find the defendant guilty both of the felony charged and also as an habitual criminal or merely of the felony charged in the indictment and the trial judge shall record the verdict of the jury and enter judgment accordingly. [Acts 1939, ch. 22, § 6; mod. C. Supp. 1950, §11863.6.]

40-2806. *Penalty — Ineligible for parole.* — When an habitual criminal as defined in § 40-2801, shall commit any of the felonies therein specified or referred to, he shall upon conviction, under presentment or indictment in form as herein provided (except where the death penalty is imposed), be sentenced as an habitual criminal, and his punishment shall be fixed at life in the penitentiary, and such offender shall not be eligible to parole, nor shall said sentence be reduced for good behavior, for other cause, or by any means, nor shall the same be suspended. [Acts 1939, ch. 22, § 2; mod. C. Supp. 1950, § 11863.2.]